

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT AYRES DaSILVA,

Petitioner,

v.

STATE OF WASHINGTON AND PIERCE
COUNTY,

Respondent.

Case No. C07-5491BHS

REPORT AND
RECOMMENDATION

**NOTED FOR:
OCTOBER 26, 2007**

This petition for a “writ of relief” has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. Petitioner invites the court to decide what type of petition he is filing (Dkt. #1, proposed petition, page 1). The majority of petitioner’s briefing refers to the matter as a writ of Coram Nobis (Dkt. # 1, proposed memorandum in support page 2 of 4); See also, (Dkt. # 1 proposed brief in support). This petition cannot be maintained either as a writ of Coram Nobis or as a Habeas Corpus petition under 28 U.S.C. § 2254. The

REPORT AND RECOMMENDATION- 1

1 petition should be dismissed.

2 From petitioner's briefing the court has been able to determine the following facts. On
3 January 8, 1998, petitioner pled guilty in Pierce County Superior Court (Dkt. # 1, proposed
4 petition page 1). Petitioner alleges he pled guilty to second degree assault. The only official
5 document that names the crime is a bench warrant which states petitioner pled guilty to second
6 degree assault with sexual motivation (Dkt. # 1, proposed brief in support page 13 of 25).

7 Petitioner alleges he was sentenced to eight months imprisonment and one year of
8 community supervision (Dkt. # 1, proposed petition, page 2). By petitioners own admission he
9 served the eight months imprisonment, but, after serving nine months of the one year on community
10 supervision he left the state in contravention of the terms of his supervision (Dkt. # 1, brief in
11 support, page 16 of 25). A bench warrant for his arrest was issued.

12 Petitioner is currently incarcerated in the Montana State Prison on a charge or conviction
13 unrelated to his Pierce County Plea. This court has no way of knowing to what extent the 1998
14 Pierce County conviction may have affected the Montana Sentence.

15 DISCUSSION

16 A. Habeas Corpus.

17 Mr. DaSilva cannot proceed with this matter as a habeas corpus petition under 28 U.S.C.
18 2254 for a number of reasons. The first reason would be that the matter is time barred. A one year
19 statute of limitations was imposed under the 1996 amendments to 28 U.S.C. § 2244(d), which were
20 signed into law April 24, 1996 as part of the Antiterrorism and Effective Death Penalty Act
21 (AEDPA). 28 U.S.C. § 2244(d) provides as follows:

- 22 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus
23 by a person in custody pursuant to the judgment of a State court. The limitation
period shall run from the latest of-
 - 24 (A) the date on which the judgment became final by conclusion of direct review
25 or the expiration of the time for seeking such review;
 - 26 (B) the date on which the impediment to filing an application created by State
27 action in violation of the constitution or laws of the United States is
removed, if the applicant was prevented from filing by such State action;

1 (C) the date on which the factual predicate of the claim or claims presented could
2 have been discovered through the exercise of due diligence.

3 (2) The time during which a properly filed application for State post-conviction or other
4 collateral review with respect to the pertinent judgment or claim is pending shall not
5 be counted toward any period of limitation under this subsection.

6 Mr. DaSilva's conviction became final on January 8, 1998, as he did not appeal the
7 conviction or sentence. He had until January 8, 1999, to file a habeas corpus petition and he did not
8 do so.

9 The issues raised by Mr. DaSilva are also unexhausted and procedurally barred. Mr. Da
10 Silva explains the steps he has taken to try to bring the matter before the state court or otherwise
11 obtain relief (Dkt. # 1, brief, page 1 to 25). Mr. DaSilva was time barred from collateral attack on
12 his conviction or sentence pursuant to RCW 10.73.140 by the time he sought relief from the state
13 court in March of 2007, nine years after his conviction became final (Dkt. # 1, proposed brief, page
14 1). Further, Mr. DaSilva presented his issues to the Superior Court and has not satisfied the
15 exhaustion requirement.

16 In order to satisfy the exhaustion requirement, petitioner's claims must have been fairly
17 presented to the state's highest court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
18 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). A federal habeas petitioner must provide the state
19 courts with a fair opportunity to correct alleged violations of prisoners' federal rights. Duncan v.
20 Henry, 513 U.S.364 (1995). It is not enough that all the facts necessary to support the federal claim
21 were before the state courts or that a somewhat similar state law claim was made. Id., *citing* Picard
22 v. Connor, 404 U.S. 270 (1971) and Anderson v. Harless, 459 U.S. 4 (1982). The claims in this
23 writ are unexhausted.

24 The final reason Mr. DaSilva may not file this petition as a Habeas Corpus petition is
25 because the issues have been procedurally defaulted. Normally, a federal court faced with an
26 unexhausted petition dismisses the petition without prejudice, so that the petitioner has an
27 opportunity to exhaust the claims in state court. Now, however, petitioner is barred from filing a
28 petition in state court as any attempt to file another petition will be deemed time barred. See, RCW

1 10.73.140.

2 Federal Courts generally honor state procedural bars unless it would result in a “fundamental
3 miscarriage of justice.” or petitioner demonstrates cause and prejudice. Coleman v. Thompson,
4 501 U.S. 722, 750 (1991). Petitioner here cannot show cause and prejudice in state court.

5 To show cause in federal court petitioner must show that some objective factor external to
6 the defense prevented petitioner from complying with state procedural rules relating to the
7 presentation of his claims. McCleskey v. Zant, 499 U.S. 467, 493-94 (1991). Here, petitioner left the
8 state prior to the expiration of his sentence and now that he is in custody in another state he seeks to
9 challenge the first conviction. Thus, petitioner cannot show cause that excuses his procedural default
10 in state court. Accordingly, this petition is procedurally defaulted and should not be considered. For
11 these reasons Mr. Da Silva cannot maintain a writ of habeas corpus.

12 B. Coram Nobis.

13 Mr. DaSilva cannot file a Writ of Coram Nobis. The sentence or conviction a person wishes
14 to challenge must be completely served prior to a Writ of Coram Nobis being considered. As Mr.
15 DaSilva himself notes:

16 ‘The writ of CORAM NOBIS affords a remedy to attack a conviction
17 **when petitioner has served his sentence and is no longer in**
18 **custody**, Specifically the writ provides a remedy for those suffering
19 from the lingering collateral consequences of an unconstitutional or
20 unlawful conviction based on error of fact and egregious legal error.
21 Estate of McKinney v. U.S. 71 F.3d 779 (9th Cir. 1995).

22 (Dkt. # 1, proposed brief in support, page 9 (emphasis added)). Mr. DaSilva served only 9 months
23 of his 12 months of community custody and then left the state. He did not serve his entire sentence.

24 This petition should be dismissed. Attempts to file a Habeas Corpus would be **DISMISSED**
25 **WITH PREJUDICE**. The Coram Nobis petition is premature and would be **DISMISSED**
26 **WITHOUT PREJUDICE**.

27 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the
28 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.
R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of

1 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
2 72(b), the clerk is directed to set the matter for consideration on **October 26, 2007**, as noted in the
3 caption.

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5 Dated this 24 day of September, 2007.

6
7 /S/ J. Kelley Arnold
8 J. Kelley Arnold
9 United States Magistrate Judge
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